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The Child Labor Decision

THE Federal Child Labor bill, which was signed by President Wilson on September 1, 1916, began its history in 1906. In the course of the congressional campaign of that year Senator Beveridge mentioned the abuse of child labor and declared that it ought to be ended by the power of the federal government. The applause that greeted his statement led him to make child labor reform through action of the federal government the chief feature of his campaign, and, on the opening of Congress, he introduced what came to be known as the Beveridge Child Labor bill. This bill proposed to regulate the products of mines and factories by prohibiting common carriers from transporting such products unless the offer for shipment was accompanied by a certificate by the management of the mine or factory stating that no children under fourteen years of age were employed in their establishments. This bill was the pioneer effort at legislation, and its chief interest now lies in that fact, as well as in the great three-days' speech by Senator Beveridge and the accompanying debate in the Senate thereon.

The first part of Beveridge's speech was devoted to the iniquitous conditions and alarming results of the child labor system. The second part was taken up with the constitutional argument in behalf of the bill. This argument was based on two premises: (1) that the power of Congress to regulate, to the extent of prohibiting, the shipment of foreign goods was unlimited, and (2) that the power of Congress over interstate commerce, being contained in the same clause with the power over foreign commerce, was likewise unlimited. Therefore, he argued, so far as the power was concerned, as distinguished from the question of

policy, it would be constitutional to exclude from interstate commerce child-made products or any other kind of goods.

The general opinion of lawyers, both in Congress and in the country at large, was that the Beveridge bill was unconstitutional. It was believed that the bill not only put an unreasonable burden upon commerce in requiring industrial establishments that did not employ children, by far the greater number, to file a certificate with every shipment, but that it overlooked the fact that the American citizen had rights under the Constitution which the foreigner did not possess.

The National Child Labor Committee had been organized two years before Senator Beveridge began his agitation. This committee occupied itself with securing the passage of child labor laws in the separate states until the times, and the minds of congressmen, were ripe for the passage of a federal law on the subject. Such an act was finally passed and was signed by the President on September 1, 1916, to go into effect one year later.¹

The act of 1916 closed the channels of interstate transportation to products of child labor. More explicitly, the act prohibited transportation, in interstate commerce, of manufactured goods, the product of a factory in which within thirty days prior to their removal therefrom children under the age of fourteen had been employed or permitted to work at all, or children between the ages of fourteen and sixteen years had been employed or permitted to work more than eight hours in any day or more than six days in any week or after the hour of seven o'clock p. m., or before the hour of six o'clock a. m.

Either independently, or under the stimulus of the National Child Labor Committee, a large number of states have enacted laws prohibiting or restricting child labor in mines and factories, and it is said that so general has become the sentiment against the exploitation of child labor that every state in the Union has a law of greater or less stringency on this subject. The public welfare is the admitted ground for this legislation. The state statutes have been uniformly upheld against every contention, either that they fell outside the police power of the state or that they contravened the provisions of the Fourteenth Amendment.²

¹ 39 U. S. Stat. 675, c. 432.

² *Sturges & Burn Mfg. Co. v. Beauchamp* (1913), 231 U. S. 320, 58 L. Ed. 245, 34 Sup. Ct. 60; *State v. Shorey* (1906), 48 Ore. 396, 86 Pac.

Thus the courts of Indiana, North Carolina, and California have spoken, respectively, as follows:

"The employment of children of tender years in mills and factories not only endangers their lives and limbs but hinders and dwarfs their growth and development physically, mentally and morally. The state is vitally interested in its own preservation, and looking to that end must safeguard and protect the lives, persons, health and morals of its future citizens."³

"The statute we are considering appears to have been framed in good faith and for the purpose of promoting the general welfare by protecting minors from injury by over-work, from liability to injury by machinery in large manufacturing establishments, and by facilitating their attendance at schools."⁴

"The legislature may undoubtedly forbid the employment of children under the age of fourteen years at any regular occupation if the interests of the children and the general welfare of society will be thereby secured and promoted."⁵

The state statutes, however, were not by any means uniform, and their varying nature worked unjust discrimination against such states as had the higher standard of legislation. The inability of a state to prevent the introduction through interstate commerce of the products of other states resulted in imposing upon the states having protective laws an unfair competition with those that had none. The situation was thus explained by the Senate Committee:

"So long as there is a single state which, for selfish or other reasons, fails to enact effective child labor legislation, it is beyond the power of every other state to protect effectively its own producers and manufacturers against what may be considered unfair competition of the producers and manufacturers of that state, or to protect its consumers against unwittingly patronizing those who exploit the childhood of the country."⁶

³⁸¹; *Starnes v. Albion Mfg. Co.* (1908), 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602; *In re Weber* (1906), 149 Cal. 392, 86 Pac. 809; *In re Spencer* (1906), 149 Cal. 396, 86 Pac. 896; *Inland Steel Co. v. Yedinak* (1909), 172 Ind. 423, 87 N. E. 229.

⁴ *Inland Steel Co. v. Yedinak* (1909), 172 Ind. 423, 87 N. E. 229.

⁵ *Starnes v. Albion Mfg. Co.* (1908), 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602.

⁶ *In re Spencer* (1906), 149 Cal. 396, 86 Pac. 896.

⁶ Sen. Rept. No. 358, 64th Cong. 1st Sess. p. 21.

Not only did the variability in child labor legislation in the different states affect, through unfair competition, the economic interests of the state which was most regardful of the welfare of its citizens, but it also tended to work injury to the health of the children in states, which, while desirous of advancing the general social welfare, were not strong enough to stand up against the economic pressure of the states having lower standards. The unrestricted freedom of interstate commerce thwarted and rendered of no avail the intentions and efforts of the most morally-minded communities. As said by Mr. Keating in Congress:

"When child-made goods are given access to interstate commerce the effect, in many instances if not in all, is to balk the state which either has legislated against child labor or contemplates doing so."⁷

The pervasive influence of interstate commerce spread its demoralizing germs throughout the whole country. The fact of evil consequences flowing from unrestricted foreign trade had been recognized by Congress on a number of occasions. For instance, by a series of acts, national legislation had prohibited the importation of convict-made goods from foreign countries.⁸ Obviously, the purpose of such laws was not to interfere with the domestic practices of foreign countries, but to protect the standards established by our own. Again, the act of Congress which prohibits the importation of white phosphorus matches is for the protection of the community against the dangers of necrosis or the "phossy-jaw."⁹ The introduction of alien contract laborers is prohibited by the immigration law,¹⁰ for the purpose, as declared by the Supreme Court, of protecting the laborers of this country:

"The purpose of this labor legislation was declared by this court almost thirty years ago in *Holy Trinity Church v. United States*, 143 U. S. 457, to be to arrest the bringing of an ignorant servile class of foreign laborers into the United States under contract to work at a low rate of wages and

⁷ 53 Cong. Rec. pt. 15, p. 1807.

⁸ Act of August 27, 1894, 28 Stat. 509, 552, c. 349, § 24; Act of July 24, 1897, 30 Stat. 151, 211, c. 11, § 31; Act of August 5, 1909, 36 Stat. 11, 87, c. 6, § 14; Act of October 3, 1913, 38 Stat. 114, 195, c. 16.

⁹ Act of 1912, 37 Stat. 81, c. 75, § 10.

¹⁰ Act of 1907, 34 Stat. 898, c. 1134, §§ 4 and 5.

thus reduce other laborers engaged in like occupations to the level of the assisted immigrant."¹¹

It is familiar knowledge that much of the theory of tariff legislation is predicated upon the same principle. Such illustrations point to the fact that Congress, in its power over foreign commerce, may restrict and prohibit the channels of foreign commerce from being used for the bringing in of articles which may be deleterious to the public welfare.

Now, after exhaustive investigation,¹² displaying an intensity of interest in the subject and a thoroughness of preparation unusual in our legislative methods, Congress passed the Child Labor Law of 1916. An especial effort was made to keep the terms of the statute within strictly constitutional bounds. The validity of the act was contested in a Federal District Court in North Carolina and the law was held unconstitutional, no opinion being written. The case was appealed to the United States Supreme Court and a decision thereon was rendered on June 3, 1918.¹³ The decision of the lower court was sustained by a vote of five to four, and the act was thus by final authority declared null and void. The position of Mr. Justice Day, who spoke for the majority, is that the act is not an act to regulate commerce among the states, but is an attempt to regulate the hours of labor of children in factories and mines within the states, and is therefore an unlawful interference with powers reserved to the states. "Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but it also exerts a power as to a purely local matter to which the federal authority does not extend."

The view of the minority is thus expressed by Mr. Justice Holmes:

"The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no

¹¹ *Scharrenberg v. Dollar S. S. Co.* (1917), 245 U. S. 122, 126, 38 Sup. Ct. 28.

¹² The government has published in nineteen volumes the results of its inquiries on the industrial, social, moral, educational and physical conditions of woman and child workers: Sen. Doc. No. 645, 61st Cong., 2d Sess.

¹³ *Hammer v. Dagenhart* (1918), 38 Sup. Ct. 529.

Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy whatever indirect effect it may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of those of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

The positions of the majority and minority are thus clearly contrasted. The inquiry must be whether the act is a regulation of interstate commerce, incidentally affecting the domestic concerns of a state, or whether it is a direct meddling with purely state affairs, although assuming the guise of an interstate regulation of commerce. Perhaps even flying under false colors would not be enough in itself to discredit and nullify the act. By analogy, in reference to the power to levy taxes, the Supreme Court has most explicitly held that, no matter whether the object of Congress was to raise revenue—the ordinary and legitimate purpose of taxation—or to tax an article or enterprise out of existence, if the tax was on its face a tax measure, it must be sustained. Thus, when it was desired to extinguish state competition with the national bank system, Congress had resort to a tax which would yield no revenue, but which probably would, and actually did, drive out of existence the circulation of state banks.¹⁴ This classic case may, indeed, be differentiated in principle, and, in strict reasoning, its application denied, because it may be said that the tax was levied not so much under the taxing power as under the clause of the Constitution that authorizes

¹⁴ *Veazie Bank v. Fenno* (1869), 8 Wall. 533, 19 L. Ed. 482.

the use of any means necessary and proper for carrying a granted power into execution. But still the court said in the *Veazie Bank* case: "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." In the *Oleomargarine* case, however, the utmost extent of the taxing power, exerted simply as such, was fully sustained.¹⁵ This case involved the constitutionality of an act of Congress which levied a tax of ten cents a pound upon oleomargarine when artificially colored to look like butter. In a long and able opinion, Mr. Justice White, now Chief Justice, held that, the law being on its face a tax measure, its ultimate effect or the motives of the legislature could not be judicially inquired into. "Undoubtedly," the opinion says, "in determining whether a particular act is within the granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. This being their necessary scope and operation, it follows that the acts are within the grant of power."

Before the adoption of the Constitution in 1789 all power over commerce, whether internal, between the several states or with foreign nations, belonged of course to each state. One of the controlling motives for a new constitution to take the place of the Articles of Confederation was to do away with the rivalry, competition and conflict between the states in the matter of commerce.¹⁶ When the Constitution surrendered to the general government power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes," it gave up all power over commerce except such as we have come to designate "intrastate." The absoluteness of the grant, carrying with it the implication that there is no vacuum left in the power over commerce, no sphere where neither state nor nation may act, is set forth by Chief Justice Marshall as follows:

"The power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitu-

¹⁵ *McCray v. United States* (1904), 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. 769.

¹⁶ *Gibbons v. Ogden* (1824), 9 Wheat. 1, 222, 6 L. Ed. 23; *Brown v. Maryland* (1827), 12 Wheat. 419, 446, 6 L. Ed. 678; *Welton v. Missouri* (1875), 91 U. S. 275, 280, 23 L. Ed. 347.

tion the same restrictions in the exercise of the power as are found in the Constitution of the United States."¹⁷

All the power over foreign and interstate commerce which the states had before the adoption of the Constitution was as much thereby transferred to Congress as was purely intrastate commerce retained by the several states. The principle is recognized by Chief Justice Marshall in the following passage:

"The power to regulate commerce here meant to be granted was that power to regulate commerce which previously existed in the states. . . . The states were unquestionably supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign state. . . . The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. . . . The grant of this power carries with it the whole subject."¹⁸

The plenary nature of the grant to the general government has been again and again emphasized by the Supreme Court from the earliest days to the latest. Nevertheless, there are constantly litigants and occasionally judges who fail to recognize the full bearing of the principles involved, a situation adverted to by Mr. Justice McKenna, when he says:

"The power is direct; there is no word of limitation in it and its broad and universal scope has been so often declared as to make repetition unnecessary, and, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack."¹⁹

As to foreign commerce, it is so well established that the power to "regulate" may include the right to "prohibit" or "destroy" traffic in certain articles, that citation of authorities is hardly necessary. "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which

¹⁷ *Gibbons v. Ogden* (1824), 9 Wheat. 1, 194, 6 L. Ed. 23.

¹⁸ *Gibbons v. Ogden* (1824), 9 Wheat. 1, 227, 6 L. Ed. 23.

¹⁹ *Hoke v. United States* (1913), 227 U. S. 308, 320, 57 L. Ed. 523, 33 Sup. Ct. 281.

is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.”²⁰

As to interstate commerce, it is admitted that the power granted to Congress is not so broad as that over foreign commerce. But, it is to be remembered, the only limitations on the power over interstate commerce are such as are found in the Constitution itself, and these limitations are, upon investigation, found to be narrowed down to the general statement of principle contained in the Tenth Amendment, and to the more specific restriction of due process in the Fifth Amendment. The principles involved are clearly and exactly stated by Justice Harlan as follows:

“In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be regarded as limiting the exercise of the power granted. . . . We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. . . . If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the states respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.”²¹

The limitations on the power over interstate commerce mentioned by Justice Harlan, and now generally taken for granted, were not considered as cutting any figure in the question of constitutionality in the Child Labor decision, the court taking its stand wholly on the ground that the act itself was not a regulation of interstate or foreign commerce.

That “regulation” involves possible “prohibition,” in the matter of interstate commerce as well as in foreign commerce, provided only that no express provision of the Constitution, especially the one preserving due process of law, is violated, is estab-

²⁰ *Butfield v. Stranahan* (1904), 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. 349.

²¹ *Lottery Case (Champion v. Ames)* (1903), 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321.

lished in several important recent cases. The earliest of this series of cases is the Lottery Case, decided in 1903, and already cited. This case held that lottery tickets are subjects of traffic among those who choose to buy and sell them, and that their carriage by independent carriers from one state to another is therefore interstate commerce. It is explicitly held that legislation under this power over commerce may properly assume the form and have the effect of prohibition. It is further held that legislation prohibiting the carriage of lottery tickets is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress. As might have been expected, the opinion of the majority of the court did not go unchallenged, and there was a minority opinion representing the views of Chief Justice Fuller and Justices Brewer, Shiras and Peckham. The contention of the minority was in substance the same as that of the majority in the Child Labor Case, namely, that the purpose of Congress was to suppress lotteries; that the countenancing or suppression of lotteries is wholly a state affair and beyond the jurisdiction of the general government; and therefore, that the prohibition of transportation of lottery tickets from one state to another does not fall within the Congressional power over interstate commerce. But the position of Justice Harlan, concurred in by Justices Brown, White, McKenna and Holmes, has not been repudiated. It has been frequently approved.

In 1906 Congress passed the Food and Drugs Act prohibiting the transportation from state to state of adulterated foods or drugs. Fifty cans of eggs shipped from one state to another state were found to be adulterated, and fell under the condemnation of the act even though they had come within the borders of a state.²² Justice McKenna, speaking for a unanimous court, said: "The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the states to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. . . . The question here is whether articles which are outlaws of commerce may be seized wherever found."

In 1913 the court held an act of Wisconsin in conflict with the

²² *Hipolite Egg Co. v. United States* (1911), 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364.

federal Food and Drugs Act.²³ Mr. Justice Day, speaking for the whole court, said:

"That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch v. Maryland*, 4 Wheat. 316, 421; *Lottery Case*, 188 U. S. 321, 355; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Hoke v. United States*, 227 U. S. 308."

In 1916, an amendment to the Food and Drugs Act, prohibiting the use of false and fraudulent labels on articles transported in interstate commerce was held valid.²⁴ Mr. Justice Hughes wrote the opinion for a unanimous court. He said:

"So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act. . . . *Hoke v. United States*, 227 U. S. 308. There . . . the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. 227 U. S., pp. 322, 323. See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57; *Lottery Case*, 188 U. S. 321."

In still another prosecution under the Food and Drugs Act, where the charges were that an article bore a false and misleading label and that an article was offered for sale under the distinctive

²³ *McDermott v. Wisconsin* (1913), 228 U. S. 115, 57 L. Ed. 754.
33 Sup. Ct. 431.

²⁴ *Seven Cases of Eckman's Alternative v. United States* (1916), 229 U. S. 510, 60 L. Ed. 411, 36 Sup. Ct. 190.

name of a different article, the prosecution was sustained under both counts.²⁵ Mr. Justice Van Devanter, speaking for the whole court, said:

"The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded in either way. That this is a legitimate exertion of the power of Congress to regulate interstate commerce is settled by our decisions. *Hipolite Egg Co. v. United States*, 220 U. S. 45; *McDermott v. Wisconsin*, 228 U. S. 115, 128; *Seven Cases of Eckman's Alterative v. United States*, 239 U. S. 510, 514. It is also settled by our decisions that 'the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.' *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497; *Crenshaw v. Arkansas*, 227 U. S. 389, 396."

Finally, the opinions of the court in the several White Slave cases,²⁶ reassert in the most positive and unequivocal language the complete power of Congress over interstate commerce and all that appertains thereto, and the fact that the means used may have the "quality of police regulations" does not in the least impair the validity of congressional legislation. The Hoke and Athanasaw cases were decided by a unanimous court. In the Caminetti case three justices dissented, but only on the question whether the offenses charged fell within the purpose and meaning of the statute. Mr. Justice McKenna, in the course of his opinion in the Hoke case, said:

"Plaintiffs in error admit that the states may control the immorality of its citizens. Indeed, this is their chief insistence, and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens, and, it may be

²⁵ *Weeks v. United States* (1918), 245 U. S. 618, 62 L. Ed. 666, 38 Sup. Ct. 534.

²⁶ *Hoke v. United States* (1913), 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281; *Athanasaw v. United States* (1913), 227 U. S. 326, 57 L. Ed. 528, 33 Sup. Ct. 285; *Caminetti v. United States* (1917), 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192, Ann. Cas. 1917 B 1168, L. R. A. 1917 F 502.

admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. We have cited examples; others may be adduced. The Pure Food and Drugs Act is a conspicuous instance. In all of the instances a clash of national legislation with the power of the states was urged, and in all rejected.

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods or drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

"This is the aim of the law expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of the government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed and penalties and prohibitions must be applied. We may illustrate again by the Pure Food and Drugs Act. Let an article be debased by adulteration, let it be misrepresented by false branding, and Congress may exercise its prohibitive power. It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state. But Congress may prohibit its transportation between the states, and by that means defeat the motive and evils of its manufacture. How far-reaching are the power and the means which may be used to secure its complete exercise we have expressed in *Hipolite Egg Co. v. United States*, 220 U. S. 45. There, in emphasis of the purpose of the law, we denominated adulterated articles as "outlaws of commerce" and said that the confiscation of them enjoined by law was appropriate to the right to bar them from interstate transportation and completed the purpose of the law by not merely preventing their physical movement but preventing trade in them between the

states. It was urged in that case as it is urged here that the law was an invasion of the power of the states. . . .

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."²⁷

In the Caminetti case, Mr. Justice Day repeated with approval the last paragraph quoted above from the Hoke case.²⁸

These cases, with their broad outlook and unequivocal language, simplify the problem of determining whether an act of Congress purporting to be an act regulating interstate commerce is a legitimate exercise of that power. They also establish the principle that an article may be made by Congress an "outlaw of commerce," and that the means for effecting the purpose of Congress may have the "quality of police regulations." It is submitted that the only qualifications upon the authority of Congress, in its regulation of interstate commerce, to outlaw articles, is that it shall not thereby deprive any person of his property without due process of law, or violate any other express prohibition of the Constitution. And the only qualification, in its employment of means having the quality of police regulations, is that it shall manifestly not have been regulating commerce at all.

The earlier measures passed by Congress outlawing articles from interstate commerce affected articles, such, for instance, as diseased cattle, which were likely to interfere with the safe transportation of other freight.²⁹ When Congress passed from this field, and outlawed lottery tickets, and other articles, innocuous in themselves, the principle ought to have been recognized that it is the national welfare, the good of the people as a whole, the protection of the more morally-minded states from the evil practices of less advanced communities, which lies at the base of all such legislation. Chief Justice Waite said explicitly that the powers over commerce, like other powers, were "entrusted to the general gov-

²⁷ Hoke v. United States (1913), 227 U. S. 308, 321, 322, 323, 57 L. Ed. 523, 33 Sup. Ct. 281.

²⁸ Caminetti v. United States (1917), 242 U. S. 470, 492, 61 L. Ed. 442, 37 Sup. Ct. 192, Ann. Cas. 1917 B 1168, L. R. A. 1917 F 502.

²⁹ 23 U. S. Stat. 32.

ernment for the good of the nation."³⁰ And, again, it is more fully declared: "Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."³¹ Such, for example, is unquestionably the principle underlying the action of Congress in its legislation on the subject of the interstate transportation of alcoholic liquors.³²

But wrong conclusions are deduced from the applications of this principle. One such erroneous inference is that Congress may exercise a police power as well as the states. Such a view tends to confuse rather than clarify the situation. It raises a quite unnecessary controversy. Congress does not assume to exercise the police power; it only says that, in the use of means to carry out one of its delegated functions, such means may perchance have the "quality of police regulations." Illustrations have already been given. Examples of a different character may be cited. Congress may not regulate coal mining. Yet it has legislated with the effect of divorcing coal mining from the railroad business, thus affecting a purely state business.³³ Congress has denied the use of interstate commerce facilities to combinations and monopolies approved by state authority.³⁴ "Even though some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority," still, if involving interstate commerce, they are within the reach of Congress.³⁵ Intrastate railroad rates as such cannot be fixed by federal authority. But if jurisdiction to do so is

³⁰ *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877), 96 U. S. 1, 9, 24 L. Ed. 708.

³¹ *Hoke v. United States* (1917), 227 U. S. 308, 322, 57 L. Ed. 523, 33 Sup. Ct. 281.

³² *Clark Distilling Co. v. Western Maryland Ry.* (1917), 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180.

³³ *United States v. Delaware, Lackawana & Western R. R.* (1915), 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. 873.

³⁴ *Northern Securities Co. v. United States* (1904), 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436.

³⁵ *Loewe v. Lawlor* (1908), 208 U. S. 274, 301, 57 L. Ed. 488, 28 Sup. Ct. 301.

essential to effective regulation of interstate commerce, the power is acknowledged.³⁶

The authority inhering in Congress, by virtue of its delegated powers, to enact legislation having the "quality of police regulations," or otherwise limiting the scope of state jurisdiction, has its analogy or counterpart in the capacity of the states, in the exercise of their police power, incidentally to affect interstate commerce. "It may sometimes happen that a law passed in pursuance of the acknowledged power of the state will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate commerce, may reach and indirectly control that subject."³⁷ It may be said, in such cases, that the acts of the state have the "quality of interstate commerce regulations." A striking illustration is found in the Louisiana quarantine law which prohibited healthy persons, even though from other states, from entering quarantined districts.³⁸

Another erroneous conclusion drawn from cases hitherto decided is that the measures having the quality of police regulations permissible to Congress may only look to the protection of the receiving or consuming state. It is an argument that was used with effect in the Child Labor decision. Yet that it is utterly indefensible seems beyond question. It is not the health, or morals, or economic welfare, either of the receiving or of the producing state as such that is legitimately to be protected by federal action. It is the national welfare which is to be conserved in any outlawry of articles deemed injurious by common public opinion. Either the Lottery, Pure Food, and White Slave cases have been decided rightly on some large constitutional principle, or they have been decided wrongly, on no constitutional principle at all, but simply in response to a popular emotion. And that there is no substantial basis for making a distinction between protection of the consuming state and that of the producing state has the sanction of the court. Said Chief Justice White:

³⁶ *Houston etc. Ry. v. United States* (1914), 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

³⁷ *Asbell v. Kansas* (1908), 209 U. S. 251, 255, 52 L. Ed. 778, 28 Sup. Ct. 485.

³⁸ *Compagnie Francaise etc. v. Louisiana Board of Health* (1902), 186 U. S. 380, 46 L. Ed. 1209, 22 Sup. Ct. 811.

"So far as the objections of the defendant are concerned they are all embraced under two headings:

a. That the act, even if the averments of the bill be true, cannot constitutionally be applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in *United States v. E. C. Knight Co.*, 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice. *United States v. Northern Securities Co.*, 193 U. S. 197, 334; *Loewe v. Lawlor*, 208 U. S. 274; *Swift & Co. v. United States*, 196 U. S. 375; *Montague v. Lowry*, 193 U. S. 38; *Shawnee Express Co. v. Anderson*, 209 U. S. 423."³⁹

The future of our constitutional government is largely dependent upon the spirit in which the Supreme Court construes and applies the commercial clause of the Constitution. If the construction be a liberal one, if the Constitution be interpreted in the spirit of Marshall, the instrument will be found flexible and sufficient to satisfy all the developing needs of society. If, on the other hand, the construction be narrow, if acts of Congress are nullified because of incidental conflict with the reserved powers of the state, the country will be driven to amendment of the Constitution, or else fail in keeping in line with the progress of enlightened communities in the world. Now, every amendment, in ordinary times, is an evidence either of insufficiency in the Constitution itself or of lack of vision on the part of its interpreters. The Twelfth and Seventeenth Amendments are logical alterations in the structure of the government, and the result desired could not have been reached otherwise than by the process of amendment. The first ten amendments are in their

³⁹ *Standard Oil Co. v. United States* (1911), 221 U. S. 1, 68, 55 L. Ed. 619, 31 Sup. Ct. 502. "The objection that the control of the states over production was interfered with was urged again and again, but always in vain. *Standard Oil Co. v. United States*, 221 U. S. 1, 68; *United States v. American Tobacco Co.*, 221 U. S. 106, 184; *Hoke v. United States*, 227 U. S. 308, 321, 322. See finally and especially, *Seven Cases of Eckman's Alternative v. United States*, 239 U. S. 510, 514, 515." Holmes, J., in *Hammer v. Dagenhart* (1918), 38 Sup. Ct. 529, 534.

nature not amendments at all, but inhere in the Constitution itself as a declaration of rights. The Thirteenth, Fourteenth and Fifteenth Amendments were necessary incidents of the great revolution involved in the Civil War. The Fourteenth Amendment would have much more completely effectuated that revolution, if it had been interpreted according to the intentions of its framers and the expectations of the country. As it was, the anticipated nationalization of civil liberty was thwarted by the construction given to the amendment.⁴⁰

The Eleventh and Sixteenth Amendments are instances of what should never have been necessary, results of a narrow and erroneous interpretation of constitutional provisions. The decision which called for the Eleventh Amendment was rendered in 1793.⁴¹ Nearly a hundred years later, Justice Bradley, speaking for the court (Justice Harlan dissenting), after referring to the views of Madison, Marshall, and Hamilton, declared:

"It seems to us that these views of those great advocates of the Constitution were most sensible and just. . . . The letter is appealed to now as it was then [in *Chisholm v. Georgia*], as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. . . . The suability of a state without its consent was a thing unknown to the law. . . . It was fully shown in an exhaustive examination of the old law by Mr. Justice Iredell in his [dissenting] opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has in any way been presented."⁴²

The Sixteenth Amendment was equally occasioned by what still seems to us a perverse view of constitutional construction.⁴³ It is difficult after all these years to reconcile oneself to the decision in the case necessitating the income tax amendment, especially when connected with the fact that it was a reversal of the adjudications of the court for the century preceding. The

⁴⁰ See the dissenting opinions of Field, Bradley, and Swayne, JJ., in *Slaughter House Cases* (1873), 16 Wall. 36, 83-130, 21 L. Ed. 394.

⁴¹ *Chisholm v. Georgia* (1793), 2 Dall. 419, 1 L. Ed. 440.

⁴² *Hans v. Louisiana* (1890), 134 U. S. 1, 14, 15, 16, 33 L. Ed. 842, 10 Sup. Ct. 504.

⁴³ *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. 912.

more extended reach of the decision on the rehearing met with a dissent concurred in by four out of the nine justices.

The amending habit is an unfortunate one to fall into. An appreciation of the Constitution as a flexible instrument renders it unnecessary. Amendments like the Eleventh and Sixteenth, if made necessary by illiberal interpretation, will tend to reduce the federal Constitution to a code of regulations like the Constitution of California. It was the intention of the Constitution of California to lock the door and set the seal on legislative liberty. Distrust was its key note. But the purpose of the Constitution of the United States was to open the doors of opportunity for full freedom of action along all the avenues of national life which it marked out. The language of Justice Story has, in substance and intent, been many times repeated when he declares:

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."⁴⁴

A regrettable incident connected with the Child Labor decision is that the invalidity of the act of Congress was declared by a five-to-four vote, and that thereby the court overlooked its own rule of constitutional construction, that every reasonable doubt must be resolved in favor of the validity of a legislative act. Does not the fact that four judges out of nine coincide with the legislature in approving the law, as well as support their position by strong arguments, establish at least a "reasonable doubt?" Among many expressions from the Supreme Court we may quote the two following:

"It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which

⁴⁴ *Martin v. Hunter's Lessee* (1816), 1 Wheat. 304, 326, 4 L. Ed. 97.

any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court.”⁴⁵

“Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.”⁴⁶

Five-to-four decisions, while not so numerous as popular impression would convey, have been of too frequent occurrence. They are regrettable under any circumstances, especially for the reason that they convey the impression that the law is so uncertain that the choicest legal minds cannot agree. But they are particularly regrettable when they lead to adjudging an act of Congress unconstitutional by a single vote. They tend to discredit our judiciary and our whole system of government. With the supreme and extraordinary function enjoyed by the judiciary in this country of pronouncing on the validity of a legislative act goes the supreme and extraordinary duty of scrupulously guarding the exercise of this function. That this duty is generally observed is a matter of constitutional history, but every now and then a case of a special prominence arises where progressive or important legislation is thwarted and an act of Congress nullified by a five-to-four vote. Perchance Congress may some day step in and limit the power of the court under the provision which declares:

“In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.”⁴⁷

Congress might, for instance, if it was in a temperate mood, require that the Supreme Court, in appeal cases, should pronounce a statute invalid only upon the concurrent vote of two-thirds of all the members thereof. A conservative attitude on the part of Congress has been thus far secured by the controlling influence

⁴⁵ Washington, J., in *Ogden v. Saunders* (1827), 12 Wheat. 213, 270, 6 L. Ed. 606.

⁴⁶ Waite, C. J., in *Sinking Fund Cases* (1878), 99 U. S. 700, 718, 25 L. Ed. 504. See *The Employers Liability Cases* (1908), 207 U. S. 463, at p. 510 for further expressions to the same effect.

⁴⁷ Constitution, Art. III, § 2.

of lawyers therein. But Civil War history shows that Congress may under circumstances resort to extreme measures either to curb the Supreme Court or to bring it into accord with the legislature.⁴⁸

The present war conditions have led to some surprising, even if temporary, upsettings of certain judicial decisions. In 1914 the State of Washington, by an initiative measure, prohibited employment agencies from collecting fees from workers seeking employment. The law was sustained by the Supreme Court of Washington⁴⁹ and by the federal District Court.⁵⁰ When, how-

⁴⁸ Under act of February 5, 1867, allowing appeals to the Supreme Court from the United States Circuit Courts in cases of habeas corpus, one McCordle, alleging unlawful restraint by military force, brought his petition before the Supreme Court. Now, in order to block action in this case, and to prevent the court from passing on the constitutionality of certain "reconstruction" measures, Congress, by act of March 27, 1868, repealed the act giving the jurisdiction on appeal in such questions as that then under consideration. The Supreme Court immediately dismissed the pending appeal for want of jurisdiction. "We are not at liberty," said the court, "to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." *Ex parte McCordle* (1868), 7 Wall. 506, 514, 19 L. Ed. 264.

The question of the constitutionality of the legal tender acts of 1862 and 1863 was argued before the Supreme Court at the December Term, 1867, reargued the next year, and decided adversely on February 7, 1870. The opinion declaring the unconstitutionality of these acts was written by Chase, C. J., and was concurred in by Nelson, Clifford, Grier (who had, however, resigned before the decision was announced from the bench) and Field, JJ., Miller, J., wrote a dissenting opinion, concurred in by Swayne and Davis, JJ. *Hepburn v. Griswold* (1870), 8 Wall. 603, 19 L. Ed. 513.

The act of Congress of 1837 had enlarged the court to nine members, a chief justice and eight associate justices. The act of March 3, 1863, added a ninth associate justice. By act of July 23, 1866, it was enacted "that no vacancy in the office of associate justice shall be filled by appointment until the number of associates shall be reduced to six." Justice Catron had died in 1865. Justice Wayne died July 5, 1867, and Justice Grier resigned Jan. 31, 1870. In the meantime, Congress, by act of April 10, 1869, again increased the number of associate justices to eight. The two existing vacancies were then filled by the appointment of Justices Strong and Bradley, known supporters of the constitutionality of the legal tender acts.

A second case, involving the constitutionality of the legal tender acts, was argued in 1871 and decided in 1872, *Hepburn v. Griswold* being overruled. The opinion of the court was written by Strong, J., and was concurred in by Swayne, Davis, and Miller, JJ., Bradley, J., writing a separate concurring opinion. Chase, C. J., Nelson, Clifford and Field, JJ., dissenting. *Knox v. Lee* (1872) 12 Wall. 457, 20 L. Ed. 287. The decision in *Knox v. Lee* was later reaffirmed and the ratio decidendi greatly enlarged, Field, J., alone dissenting. *Legal Tender Cases* (1883), 110 U. S. 421, 28 L. Ed. 204, 4 Sup. Ct. 122.

⁴⁹ *Huntworth v. Tanner* (1915), 87 Wash. 670, 152 Pac. 523; *State v. Rossman* (1916, Wash.), 161 Pac. 349.

⁵⁰ *Wiseman v. Tanner* (1914), 221 Fed. 694.

ever, the law came before the Supreme Court of the United States, it was held invalid, as violative of the due process clause of the Fourteenth Amendment, by a five-to-four vote.⁵¹ Mr. Justice Brandeis, for the minority, in an opinion of exceptional reliance upon social and economic conditions, showed that the business of private employment agencies was subject to the grossest frauds and dishonesties. President Wilson has now issued a proclamation in effect carrying out the purpose of the Washington law and intended to put private employment agencies out of existence throughout the country and to give the Federal Employment Service a monopoly of the business of recruiting and distributing labor. The President justifies his proclamation on the ground that the chaos attending the activities of private employment agencies was threatening the existence of the nation.

A statute of Kansas made it unlawful for an employer to require an agreement from employees, actual or prospective, not to join, or to continue to be members of, a labor organization. The Supreme Court, by a vote of six to three, held the act unconstitutional.⁵² In reliance upon the principle of that case the court has held, again with a dissenting minority of three, that an employer is free to make non-membership in a union a condition of employment and that it is unlawful for agents of a union to attempt to recruit members among employees of an open shop.⁵³

As if in reply to the decisions in these two cases, the National War Labor Conference Board, known as the Taft-Walsh Board, recommended, and the President approved and affirmed as principles to govern the relations between employers and employees, that the right to organize in trade unions should not be denied, abridged or interfered with by employers in any manner whatsoever and that "employers should not discharge workers for membership in trade unions."

The Child Labor Decision was rendered on June 3. On July 19, the War Labor Policies Board adopted a resolution making the Secretary of Labor responsible "for the enforcement

⁵¹ Adams v. Tanner (1917), 244 U. S. 590, 61 L. Ed. 1336, 37 Sup. Ct. 662, Ann. Cas. 1917 D 973, L. R. A. 1917 F 1163. See 5 Cal. Law Rev. 494.

⁵² Coppage v. Kansas (1915), 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240.

⁵³ Hitchman Coal & Coke Co. v. Mitchell (1917), 245 U. S. 229, 38 Sup. Ct. 424. See 6 Cal. Law Rev. 302.

of the contract clause with reference to the employment of children by which all government contracts are to contain a clause providing that the contractor shall not directly or indirectly employ any child under the age of fourteen years, or permit any child between the ages of fourteen and sixteen to work more than eight hours in any one day, more than six days in any one week, or before 6 a. m. or after 7 p. m." The purport of this order is substantially the same as that of the nullified Child Labor law.

These practical reversals of decisions of the Supreme Court are, of course, due to the extraordinary conditions now prevailing. It cannot be maintained that the executive has been usurping authority or acting ruthlessly in upsetting the rulings of the judiciary. He has only been acting within the wide limits of the war power. It has happened that legislation of a much desired character, which was deemed impracticable because of assumed constitutional limitations, has been put into effect as war emergency measures. The condition of things is interesting; whether the consequences will ultimately be beneficial or otherwise, remains to be determined. We do not see in the situation, however, a condition showing that "we are rapidly becoming a nation divided against ourselves at the fountain heads of authority."⁵⁴ Rather, we hope that it may bring the Supreme Court to see with more enlarged vision, than has always been the case, the meaning of the principles of constitutional construction of legislative acts. The Child Labor decision has declared that any single state may compel the use of the interstate channels of commerce for its products in wilful disregard of national sentiment. Will the court abide by this rule, or will it come to a recognition of Mr. Justice Holmes' view: "The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state?"

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⁵⁴ The New Republic, August 3, 1918, p. 8.